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**IN THE
COURT OF APPEALS OF INDIANA**

NATHAN DAQUAN JENKINS,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 48A04-0603-CR-119

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis Carroll, Judge
Cause No. 48D01-0404-MR-120

April 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Nathan Jenkins appeals his conviction for murder and the resulting sixty-year sentence. We affirm.

Issues

Jenkins raises three issues, which we consolidate and restate as:

- I. whether the trial court erred in admitting certain evidence; and
- II. whether the trial court erred in sentencing Jenkins.

Facts

On April 7, 2004, a concerned caller alerted Anderson Police Department Sergeant William Casey that there was possibly a dead body located at a house on Dewey Street. Sergeant Casey and other officers visited the location and found thirty-three-year-old Dion Warner dead on his living room floor. His head was lying in a pool of blood. The officers noticed a spent shell casing on the floor. When they turned Warner's body over, they noticed that his hand was in his front pocket. When they pulled Warner's hand out of his pocket, there was a small gun in his hand.

That same day, officers began interviewing Warner's neighbors, including nineteen-year-old Jenkins, who lived next door to Warner with his girlfriend Kandace Tate. During his first interview, Jenkins told Detective Larry Crenshaw that he had not seen Warner for a week. Jenkins also denied owning a gun. During a second videotaped interview the following day, Detective Randy Tracy accused Jenkins of murdering Warner. The detective also told Jenkins this was his opportunity to tell the detective if

Warner was “coming at [him]” at the time of the shooting. Tr. p. 901. Jenkins again denied shooting Warner, who died of a bullet wound to the head.

Jenkins was subsequently charged with Warner’s murder. The evidence at trial revealed that on April 2, 2004, Warner and Eric Hyatt were at Jenkins’s house when Hyatt accused Warner of stealing his bicycle. Warner denied the theft and he and Hyatt began shoving each other. As Tate tried to get the men out of her house, Warner apparently pushed her. Tate paged Jenkins and asked him to come home. As soon as Jenkins walked in the door, Tate told him that Warner pushed her. Jenkins left the house with his gun in his hand. When he returned home, he told everyone, “ain’t no more Dion.” Tr. p. 380.

Later that evening, Jenkins apparently ran to Andre Mitchell’s nearby house. Jenkins dropped his gun’s magazine next to Mitchell’s car and threw the gun in an adjoining field. Mitchell retrieved the gun, and police later found it tucked in a boot in Mitchell’s closet. Expert testimony at trial linked the gun, the magazine, and the bullet removed from Warner’s head. Expert testimony also revealed that Warner would have been “immediately incapacitated” at the time of the shooting because of the force the bullet inflicted on his brain. Tr. p. 577.

Jenkins testified that he shot Warner in self-defense. Specifically, he explained that he shot Warner when the victim pulled a gun out of his pocket, pointed it at Jenkins, and clicked it. A jury convicted Jenkins of murder, and the trial court sentenced him to sixty years. Jenkins appeals his conviction and sentence.

Analysis

I. Admission of Evidence

The admission of evidence is a determination entrusted to the discretion of the trial court. Saunders. v. State, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006), trans. denied. We will reverse a trial court's decision only for an abuse of discretion. Id. An abuse of discretion occurs when the decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. Id.

A. Videotape of Detective Tracy's Interview with Jenkins

Detective Tracy interviewed Jenkins on April 8, 2004. During the interview, the detective told Jenkins that he knew that Jenkins killed Warner. The trial court admitted the videotape into evidence at trial over Jenkins's objection. However, the court also gave the jury the following limiting instruction:

[L]et me explain to you that the statements, comments and expressions of opinion of Detective Tracy during . . . Nathan Jenkins's interrogation are not offered for their truthfulness or to show that Detective Tracy had any more information than will be available to you. They're not offered for their accuracy, but only to show the context of the full interrogation and the method of questioning intended to elicit information [from] the defendant. They're not offered as evidence of guilt.

Tr. p. 907. At Jenkins's request, the court gave this instruction at the conclusion of the videotape.

Jenkins now argues that the trial court erred in admitting the videotape into evidence because Detective Tracy's comments as to Jenkins's guilt violate Indiana Evidence Rule 704(b), which prohibits a witness giving opinions of guilt. Our supreme court addressed a similar issue in Strong v. State, 538 N.E.2d 924 (Ind. 1989), where Strong argued that the trial court erred in admitting a tape recording of his police

interview because it contained inadmissible hearsay. However, the trial court had given the jurors a limiting instruction advising them that what the police officer said was not evidence and was not to be considered as evidence. Rather, it was to be considered as questioning and questions in order to elicit information from the defendant. Our supreme court found no error in the admission of the tape recording because of the trial court's admonishment to the jury. *Id.* at 927. Here, as in *Strong*, we find no error because of the trial court's similar admonishment to the jury.¹

Jenkins also argues that trial court erred because it gave the limiting instruction after, rather than before, it played the videotape of his interview. However, it was Jenkins who asked the court to read the instruction at the conclusion of the videotape. He may not now complain that this timing is erroneous. *See Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005). Under the doctrine of invited error, which is grounded in estoppel, a party may not take advantage of an error that he commits, invites, or is a natural consequence of his own neglect or misconduct. *Id.* at 907. Because Jenkins created this situation by requesting the timing of the instruction, he cannot now take advantage of a possible error. *See id.*

B. Videotape of James Munson's Police Interview

In May 2004, Detective Tracy interviewed James Munson, Jenkins's cellmate at the Madison County Jail. During the interview, Munson told Detective Tracy that Jenkins told him that he killed Warner over a girl, not over a bicycle. At the January

¹ Jenkins's reliance on *Smith v. State*, 721 N.E.2d 213 (Ind. 1999), is misplaced because the jury in that case did not receive a limiting instruction.

2006 trial, Munson testified that he did not remember the May 2004 statement because it had been so long since he had given it. Munson also explained the he was forty-two-years-old, had done a lot of drugs during his life, and his brain was just “burnt out.” Tr. p. 743. Although he watched a videotape of his interview to refresh his recollection the morning of trial, he was still having problems independently remembering what Jenkins had told him about the murder when they were cellmates. The trial court admitted a videotape of Munson’s 2004 interview into evidence over Jenkins’s objection.

Jenkins contends that the trial court erred in admitting Munson’s statement into evidence. Specifically, he contends that Munson’s statement violates Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), because he did not have the opportunity to cross-examine Munson regarding his statement. In Crawford, the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment to the Federal Constitution prohibits admission in a criminal trial of testimonial statements by a person who is absent from trial, unless the person is unavailable and the defendant had a prior opportunity to cross-examine the person. Fowler v. State, 829 N.E.2d 459, 464 (Ind. 2005).

Here, however, Munson was present at trial. He simply could not recall the events in his statement. Such a case is governed by United States v. Owens, 484 U.S. 554, 558, 108 S.Ct. 838, 842 (1988), wherein the United States Supreme Court held that as long as the declarant testifies, the Confrontation Clause has been satisfied even if the declarant is unable to recall the events in question. The feigned or real absence of memory is itself a factor for the trier of fact to consider in evaluating the witness’ credibility. Fowler, 829

N.E.2d at 466 (citing Owens, 484 U.S. at 559). We find no Crawford violation, and the trial court did not err in admitting Munson's statement into evidence.

II. Sentencing

At the sentencing hearing, Jenkins admitted that he had juvenile adjudications for battery, theft, and carrying a handgun without a license. The trial court used these adjudications as aggravating factors and sentenced Jenkins to sixty years. Jenkins's sole contention is that the trial court violated Apprendi v. New Jersey, 530 U.S. 466 (2004) and Blakely v. Washington, 542 U.S. 296 (2004), because his juvenile adjudications were not submitted to a jury and proven beyond a reasonable doubt. As the sole authority to support his contention, Jenkins directs us to Pinkston v. State, 836 N.E.2d 453 (Ind. Ct. App. 2005), trans. denied, wherein a panel of this court held that juvenile adjudications are not prior convictions and are therefore not exempt from the Apprendi/Blakely analysis. Id. at 460.

However, our supreme court has subsequently held that juvenile adjudications are proper sentencing considerations for a trial court and need not be submitted to a jury.² Ryle v. State, 842 N.E.2d 320, 321 (Ind. 2005), cert. denied, 127 S.Ct. 90 (2006). The trial court did not err in considering Jenkins's juvenile adjudications or in sentencing him.

² Even if they were not, Jenkins admitted the adjudications at the sentencing hearing. In accordance with Blakely, our supreme court recognizes four proper ways for a trial court to enhance a sentence with aggravating circumstances: 1) prior convictions; 2) a fact found by a jury beyond a reasonable doubt; 3) facts when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived Apprendi rights and stipulated to certain facts or consented to judicial fact finding. White v. State, 846 N.E.2d 1026, 1035 (Ind. Ct. App. 2006), trans. denied.

Conclusion

The trial court did not err in admitting evidence or in sentencing Jenkins. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.